UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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LARRY CALDWELL,

Plaintiff,

v.

ROSEVILLE JOINT UNION HIGH SCHOOL DISTRICT; JAMES JOINER and R. JAN PINNEY, in their official capacities as members of the Board of Education; TONY MONETTI in his official capacity as Assistant Superintendent for Curriculum and Instruction, DONALD GENASCI in his official capacity Deputy Superintendent for Personnel and Chief Compliance Officer; RONALD SEVERSON in his official capacity Principal of Granite Bay High School; and Does 1 through 10.

Defendants.

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NO. CIV. S-05-0061 FCD JFM

MEMORANDUM AND ORDER

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This matter is before the court on defendants' motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), 8(a), and 10(a). For the reasons set forth below,[1] defendants' motion is GRANTED in part and DENIED in part.

**BACKGROUND[2]**

From June 3, 2003 through June 1, 2004, Larry Caldwell ("plaintiff") sought to introduce new material into the science program in defendant Roseville Joint Union High School District ("District"). (Pl.s' Third Am. Compl. ("TAC"), filed July 29, 2005, ¶ 14). Teachers from the district teach Darwin's theory of evolution in biology classes. (Id.) Plaintiff sought to have the District adopt his Quality Science Education Policy ("QSEP"), which presents some of the scientific weaknesses of evolution along with the scientific strengths. (Id.) In seeking to persuade public officials of the district to adopt the QSEP, plaintiff engaged in three distinct public processes. (Id. ¶ 16). Specifically, plaintiff sought 1) to list the QSEP as an agenda item on school board meetings, 2) to participate on the curriculum instruction team, and 3) to participate in the district's "instructional materials challenge" procedure. (Id. ¶¶ 6, 10, 12). Plaintiff alleges the following in support of his claims.

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[1] Because oral argument will not be of material assistance, the court orders the matter submitted on the briefs. E.D. Cal. Local Rule 78-230 (h).

[2] The factual background of this case is taken from plaintiff's complaint.

**A. School Board Meetings**

Plaintiff sought to place items on the school board agenda and have the board vote on his QSEP policy. (See id. ¶¶ 6-10). The School Board regularly holds meetings open to the public. (Id. ¶ 17). Plaintiff requested that the QSEP be placed on the agenda of a regular school board meeting for public debate and potential adoption. (Id.) The school board listed the topic of "supplemental materials" instead. (Id. ¶ 18). Plaintiff questioned R. Jan Pinney ("Pinney"), a member of the Board of Trustees, about the omission of the QSEP from the board's agenda. (Id.) Pinney told plaintiff that the omission was intentional and instructed plaintiff that he would need to obtain approval from each high school council before he would be permitted to place the QSEP on the school board's agenda. (Id.)

Despite Pinney's instruction, plaintiff proceeded to seek adoption of his QSEP proposal through the school board, but the school board refused to list the QSEP on the board's agenda. (Id. ¶ 27). In total, the board denied plaintiff's request to place the QSEP on the meeting agenda on 12 occasions. (Id.) On April 19, 2004, plaintiff threatened legal action if the district continued to refuse to place the QSEP on the board's agenda. (Id. ¶ 24). In response, Superintendent Tony Monetti ("Monetti") agreed to place the QSEP on the board's agenda on May 4, 2004 (Id. ¶¶ 24-25). The board entertained discussion from the public regarding the QSEP and was prepared to vote on its adoption. (Id. ¶ 25). According to plaintiff, Monetti then "asserted a bogus procedural objection" that prevented the board from voting to adopt the QSEP. (Id.) Plaintiff requested to

discuss the QSEP again at a later meeting. The board denied his request. (Id.) Plaintiff alleges that defendants' refusal to place the QSEP on the board agenda and the deprivation of a board vote was motivated by an intent to discriminate against Caldwell and other citizens on the basis of their viewpoint and/or their religious beliefs and affiliations. (Id. ¶ 28).

**B. Curriculum Instruction Team**

Plaintiff also sought to express his views by participating in the Curriculum Instruction Team ("CIT") of his daughter's high school, Granite Bay High School ("GBHS"). (Id. ¶ 29). The CIT is a parent advisory council with the purpose of informing and involving parents in the development of programs at GBHS. (Id. ¶ 33). A newsletter addressed to parents of students of GBHS invited participation and presented a potential topic: "How is evolution taught in our school? . . . If you have questions like these about curriculum and instruction issues at GBHS, the Curriculum and Instruction team is the place for you." (Id.)

Plaintiff viewed the CIT as a potential avenue to address his ideas about the QSEP and asked the school principal, Ronald Severson ("Severson") whether it would be a proper forum. (Id. ¶ 34). Severson responded that he would prefer to meet and discuss these issues with plaintiff individually rather than at the CIT meeting. He also informed plaintiff that he did not support the QSEP. (Id.)

The agenda for the CIT meeting on December 3, 2003, included a topic regarding updating the science curriculum and referred to the QSEP. (Id. ¶ 35). Plaintiff and others supporting plaintiff's views attended the CIT meeting, but Severson told

them that they would not be permitted to discuss the QSEP. Severson removed the item from the agenda. (Id.) Plaintiff was not allowed to discuss the QSEP at any later CIT meetings that year. (Id.) Plaintiff believes that defendants' refusal to permit him to discuss the QSEP at CIT meetings was motivated by hostility toward plaintiff's actual and perceived religious beliefs. (Id. ¶ 36).

**C. Instructional Materials Challenge**

Additionally, plaintiff sought to challenge the use of the Holt Biology Textbook in the district. (Id. ¶ 38). The district has an "instructional materials challenge" procedure for parents and others to object to the use of a particular textbook. (Id.) The challenge provides four levels of review: individual teachers (Level One), school principals (Level Two), Assistant Superintendent of Curriculum Instruction (Level Three), and Superintendent (Level Four). (Id.)

In September 2003, plaintiff challenged the Holt Biology Textbook on the grounds that its coverage of evolution was not "accurate, objective, and current" as required by the California Education Code. (Id. ¶ 39). Plaintiff's proposed solution was to supplement the current text with the QSEP materials. (Id.) Because all teachers in the district used the textbook, the District and plaintiff agreed that the Level One challenge could be satisfied through a consolidated challenge as opposed to meeting each teacher individually. (Id.) Plaintiff also believed that this meeting would satisfy the second level of review. (Id.) Most of the district's science teachers attended the meeting, and plaintiff believes that principals and

administrators were also in attendance. (Id.) On December 15, 2003, nineteen science teachers rejected plaintiff's challenge. (Id.) Plaintiff is unclear whether he was accorded a level two review and alleges that he was not afforded a level three or level four review. (Id. ¶¶ 43-45). Plaintiff believes that the district's failure to comply with its own instructional materials challenge was based on both "religious animus" and viewpoint discrimination. (Id. ¶ 46).

**D. Procedural History**

Plaintiff filed administrative complaints to the district on behalf of himself and others. (Id. ¶ 47). Genasci had the legal authority to respond to plaintiff's allegations and denied each of the administrative complaints. (Id.) Plaintiff alleges he has exhausted his administrative remedies. (Id. ¶ 51).

Plaintiff filed this action in federal court on January 11, 2005. He amended the complaint once as of right on January 18, 2005. He then sought leave to amend to file a second amended complaint ("SAC"). The court granted plaintiff leave and the SAC was filed on March 10, 2005. Defendants filed a motion to dismiss the SAC for lack of subject matter jurisdiction and for failure to state a short plain statement of relief as required under Rule 8(a). On June 30, 2005, the court issued an order dismissing the SAC under Rule 8(a) and directing plaintiff to file an amended complaint within thirty days. The court vacated defendants' motion to dismiss as moot. On July 29, 2005, plaintiff filed the third amended complaint ("TAC").

Plaintiff's TAC alleges the following claims: 1) violation of civil rights under 42 U.S.C. § 1983; 2) violations of state

constitutional laws; and 3) waste of tax dollars under California Code of Civil Procedure section 526(a). Plaintiff seeks declaratory and injunctive relief, nominal damages, and attorney's fees and costs. (Pl's. Prayers for Relief ¶¶ 1-24).

**STANDARD**

**A. Subject Matter Jurisdiction**

Under Rule 12(b)(1), a party may by motion raise the defense that the court lacks "jurisdiction over the subject matter" of a claim. Fed. R. Civ. P. 12(b)(1). It is well established that the party seeking to invoke the jurisdiction of the federal court bears the burden of establishing the court's subject matter jurisdiction. Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). The Eleventh Amendment limits the subject matter jurisdiction of the federal courts. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 53-54 (1996).

A motion to dismiss for lack of subject matter jurisdiction may attack the allegations of jurisdiction contained in the complaint as insufficient on their face to demonstrate the existence of jurisdiction ("facial attack"). Thornhill Publishing Co. v. General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979). If the motion constitutes a facial attack, the court must consider the factual allegations of the complaint to be true. Williamson v. Tucker, 645 F.2d 404, 412 (5th Cir. 1981).

**B. Motion to Dismiss**

On a motion to dismiss, the allegations of the complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322 (1972). The court is bound to give plaintiff the benefit of

every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. See id.

Given that the complaint is construed favorably to the pleader, the court may not dismiss the complaint for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. Conley v. Gibson, 355 U.S. 41, 45 (1957); NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

Nevertheless, it is inappropriate to assume that plaintiff "can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters, 459 U.S. 519, 526 (1983). Moreover, the court "need not assume the truth of legal conclusions cast in the form of factual allegations." United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986).

**C. Rule 8(a)**

Rule 8(a) requires that a pleading provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The pleading must give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. See Conley v. Gibson, 355 U.S. 41, 47 (1957). "[D]ismissal for a violation under Rule 8(a)(2) is usually confined to instances in which the complaint is 'so

verbose, confused or redundant that its true substance, if any, is well disguised.'" Gillibeau, 417 F.2d at 431 (citing Corcoran v. Yorty, 347 F.2d 222, 223 (9th Cir. 1965)).

**D. Rule 10(a)**

The Federal Rules of Civil Procedure provide, "[i]n the complaint, the title of the action shall include the names of all the parties." Fed. R. Civ. P. 10(a). "The rule serves to apprise the parties of their opponents, and it protects the public's legitimate interest in knowing all the facts and events surrounding court proceedings." Doe v. Rostker, 89 F.R.D. 158, 160 (D. Cal. 1981). If a party is unknown at the time a complaint is filed, federal courts typically will allow the use of a fictitious name in the caption so long as it appears that the plaintiff will be able to obtain the true name through the discovery process. Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980).

**ANALYSIS**

**A. Jurisdiction and Justiciability**

**1. Justiciability**

Defendants raise a number of arguments relating to the court's jurisdiction over plaintiff's claims, including issues relating to standing, the political question doctrine, and mootness. These arguments are off-point because they address claims not before the court.

Defendants repeatedly argue that plaintiff's "real complaint is that the District did not adopt his QSEP." (Defs.' Reply, filed Sept. 16, 2005, at 5). This so-called "real complaint" was never filed by plaintiff. On defendants' motion to dismiss, the

court may only address plaintiff's claims, not defendants' claims. Here, plaintiff claims that: (1) defendants are denying him the opportunity to speak at various types of school district meetings, thus violating his rights guaranteed by the First and Fourteenth Amendments; (2) plaintiff was treated differently and unfairly because of his religious beliefs in violation of the Free Speech Clause, his right to petition the government, the Establishment Clause, the Equal Protection Clause, and his rights to procedural due process; and (3) his constitutional rights will continue to be violated by defendants based upon their past pattern and practice. Plaintiff's TAC does not seek an order by this court requiring the adoption of the QSEP in the school curriculum. Defendants' various and extended arguments addressing this non-existent allegation are not germane to defendants' motion and will not be considered by the court.

In addition, defendants argue the *merits* of plaintiff's claims, which seek relief for the above alleged violations of his Constitutional rights. On a Rule 12(b) motion to dismiss, the court may only examine the *allegations* of the complaint. The court may not look at the merits of plaintiff's claims or defendants' factual defenses. This does not mean that defendants may not ultimately prevail on a motion for summary judgment. It means that, as a result of defendants' motion to dismiss, the court can only consider the allegations on the face of the complaint, viewed in a light most favorable to the plaintiff. See Fed. R. Civ. Proc. 12(b)(6). Therefore, the court will not address those arguments of defendants more properly made on a motion for summary judgment. See Fed. R. Civ. Proc. 56.

**2. Eleventh Amendment Immunity**

Plaintiff's TAC alleges claims against the District and against all individual defendants in their official capacities.[3] Defendants argue that they are entitled to Eleventh Amendment sovereign immunity, and therefore, this court does not have jurisdiction over plaintiff's claims.

Defendants argue that plaintiff's claims against the District should be dismissed because the Eleventh Amendment bars a federal court from hearing claims by a citizen against dependant instrumentalities of the state. Cerrato v. San Francisco Comm. College Dist., 26 F.3d 968, 972 (9th Cir. 1994). The Ninth Circuit has established that California school districts are state agencies. See Belanger v. Madera Unified School District, 963 F.2d 248, 251 (9th Cir. 1992) (holding that a school district was a state agency for purposes of the Eleventh Amendment because a judgment against the school district would be satisfied out of state funds and because the district performed central government functions). Under the Eleventh Amendment, agencies of the state are immune from private damage actions or suits for injunctive relief brought in federal court. Mitchell v. Los Angeles Comm. College Dist., 861 F.2d 198, 201 (9th Cir. 1988) (citing Pennhurst State Sch & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (Eleventh Amendment proscribes suit against state

[3] Plaintiff designated that the individual defendants were being sued "in their official capacities" in the TAC. Plaintiff failed to request and receive leave to amend the SAC to properly change the caption. As such, the changes must be stricken. Nevertheless, in assessing the TAC, the court will consider this amendment as a demonstration of plaintiff's intention to sue the individual defendants only in their official capacities.

agencies "regardless of the nature of the relief sought"). Thus, because the District is a state agency, it possesses Eleventh Amendment immunity from plaintiff's claims for damages and for injunctive relief. Id. Defendants' motion to dismiss plaintiff's claims against the District are GRANTED.

Defendants also argue that the individual defendants are entitled to immunity under the Eleventh Amendment. Generally, a claim asserted against an officer of the state, acting in his/her official capacity is, as a matter of law, asserted against the State of California itself, Brandon v. Holt, 469 U.S. 464, 471-72 (1985), and therefore is generally barred on Eleventh Amendment immunity grounds. See Dittman v. California, 191 F.3d 1020, 1026 (9th Cir. 1999) ("The Eleventh Amendment bars actions for damages against state officials who are sued in their official capacities in federal court.") (citations omitted). However, "[i]t is well established that the Eleventh Amendment does not bar a federal court from granting prospective injunctive relief against an officer of the state who acts outside the bounds of his authority." Cerrato, 26 F.3d at 973; Ex parte Young, 209 U.S. 123. To the extent that plaintiff seeks declaratory and injunctive relief under federal law against the individual defendants, defendants' motion to dismiss is DENIED.

This exception to the general rule granting immunity does not apply when a plaintiff alleges that a state official has violated a state law. Pennhurst, 465 U.S. at 105-06 ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). "Ex parte Young allows

prospective relief against state officers only to vindicate rights under federal law." Spoklie v. Montana, 411 F.3d 1051, 1059 (9th Cir. 2005). To the extent that plaintiff's TAC alleges violations of state law by the individual defendants in their official capacity, defendants' motion is GRANTED.

Plaintiff's TAC alleges violations of federal and state constitutional law as well as a state taxpayer claim for wasted/illegally expended municipal funds. Plaintiff seeks declaratory and injunctive relief, nominal damages, and attorney's fees and costs. Under 42 U.S.C. § 1988, one who prevails in a § 1983 action is entitled to recover attorney's fees as costs, not as damages. See Williams v. Vidmar, 367 F. Supp. 2d 1265, 1277 (N.D. Cal. 2005). Thus, plaintiff's only claims for monetary damages are in the form of his request for nominal damages in the amount of $100. Because a suit for damages against a state official is barred by the Eleventh Amendment, defendant's motion to dismiss plaintiff's claim for nominal damages is GRANTED.

**3. Exhaustion of Administrative Remedies**

Defendants argue that this case should be dismissed because plaintiff has failed to exhaust his administrative remedies. "[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982) (*superceded* on other grounds); See also Porter v. Nussle, 534 U.S. 516, 523 (2002)(*superceded* on other grounds). Accordingly, defendants' motion is DENIED.

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**B. Immunity**

**1. Federal Qualified Immunity**

Defendants argue that plaintiffs complaint should be dismissed because they are entitled to federal qualified immunity under § 1983. "Qualified immunity is an affirmative defense to damage liability; it does not bar actions for declaratory or injunctive relief." Amer. Fire, Theft, & Collision Managers, Inc. v. Gillespie, 932 F.2d 816, 818 (9th Cir. 1991) (citations omitted). Plaintiff brings this suit for declaratory and injunctive relief, nominal damages, and for attorneys' fees and costs. Therefore, to the extent that plaintiffs assert claims for equitable relief, defendants are not protected by federal qualified immunity. See Hoohuli v. Ariyoshi, 741 F.2d 1169 (9th Cir. 1984) ("[I]mmunity from injunctive relief is generally without foundation. . . . The availability of such injunctive relief is necessary to permit the vindication of important federal rights."). Defendants' motion to dismiss based upon federal qualified immunity is DENIED.

**2. State Law Immunity**

Defendants argue that they are immune based upon state law absolute or discretionary immunity. State statutory immunity provisions do not apply to federal civil rights actions. Guillory v. Orange County, 731 F.2d 1379, 1382 (9th Cir. 1984). The Ninth Circuit explained, "To construe a federal statute to allow a state immunity defense 'to have controlling effect would transmute a basic guarantee into an illusory promise,' which the supremacy clause does not allow." Id. (citations omitted). Therefore, state law immunity provisions will not guard

defendants from plaintiff's § 1983 claims for relief and defendants' motion to dismiss based upon state law immunity is DENIED.[4]

**C. Plaintiff's Alleged Failure to State a § 1983 Claim**

Turning to the sufficiency of plaintiff's § 1983 allegations, defendants contend that plaintiff fails to state sufficient allegations. To state a claim under § 1983, plaintiffs must plead that (1) defendants acted under color of law, and (2) defendants deprived plaintiff of rights secured by the Constitution or federal statutes. Gibson v. U.S., 781 F.2d 1334, 1338 (9th Cir. 1986).

**1. Plaintiff's Free Speech Rights**

Plaintiff alleges that his First Amendment rights were violated because defendants refused to place his QSEP on the agenda. (TAC ¶¶ 17-28). Defendants argue and plaintiff admits that he was able to place the QSEP on the agenda and discuss it at a school board meeting. (Id. ¶ 25). However, plaintiff alleges that he was unable to place the QSEP on the agenda for twelve meetings during the 2003-2004 school year because defendants intended to discriminate against him based on his religious beliefs and affiliations. (Id. ¶ 28). Plaintiff also alleges that, based upon defendants' past conduct, he is likely to be denied his rights to place the QSEP on the meeting agenda in the future. (Id.)

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[4] Because plaintiff's state law claims against the individual defendants are barred by the Eleventh Amendment, this court does not address defendants' arguments regarding the applicability of state law discretionary or absolute immunity to plaintiff's state law claims.

Because this case concerns the government's ability to limit private expression in a public context, it is governed by the public forum doctrine. Levanthal v. Vista Unified Sch. Dist., 973 F. Supp. 951, 956 (S.D. Cal. 1997). The Supreme Court has identified thee distinct types of fora: (1) traditional public fora, "places which by long tradition or by government fiat have been devoted to assembly and debate;" (2) limited public fora, places generally open to the public for expressive activity, "even if [the government] was not required to create the forum in the first place;" and (3) nonpublic fora, "public property which is not by tradition or designation a forum for public communication." Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45-46 (1983). Under this doctrine, the state's ability to regulate speech depends on the nature of the forum. See id.

The State of California has designated certain public property for use as public fora. Under the Brown Act and the California Education Code, the California Legislature has designated school board meetings as limited public fora, i.e. fora open to the public in general, but limited to comments related to the school board's subject matter. Cal. Gov. Code § 54954.3 (West 2005); Cal. Educ. Code § 35145.5 (West 2005); see Leventhal, 973 F. Supp at 957; Baca v. Moreno Valley Unified Sch. Dist., 936 F. Supp. 719, 729 (C.D. Cal. 1996). The government may impose content neutral regulations on speech in limited public fora if they are reasonable time, place, or manner restrictions. See Perry, 460 U.S. at 46. The government may

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only impose content based prohibition is they are "narrowly drawn to effectuate a compelling state interest." Id.

Plaintiff alleges that on numerous occasions he was restricted from placing the QSEP on the agenda and presenting the QSEP at open school board meetings because of his viewpoint. "The public's right to speak at open school board meetings includes the right to place school matters on the agenda of those meetings." Leventhal, 973 F. Supp. at 962 n. 7 (citing Cal. Educ. Code § 35145.5). Because plaintiff has alleged that defendants have restricted his speech in a limited public forum on the basis of it content, plaintiff has sufficiently pled a claim for violation of his First Amendment Right to free speech.[5] Defendants' motion is DENIED.

**2. Plaintiff's Petition Rights**

Plaintiff alleges that defendants deprived him of his constitutional rights to petition and instruct the government. The First Amendment protects citizens' rights to petition the government for redress of grievances. See Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464 (1979); Evers v. County of Custer, 745 F.2d 1196, 1204 (9th Cir. 1984). "[T]he right to petition extends to all departments of the government, including the executive department, the legislature, agencies, and the courts." White v. Lee, 227 F.3d 1214, 1232

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[5] To the extent that defendants argue that there is a sufficient justification for restricting plaintiff's speech, they may later assert such a compelling government interest. However, the assertion or sufficiency of such a government interest cannot be evaluated at this stage of the litigation.

(9th Cir. 2000). However, this right to petition is not absolute.

> [The] right to petition government afforded by the First Amendment does not include the absolute right to speak in person to officials. Where written communications are considered by government officials, denial of a hearing does not infringe upon the right to petition. The right to petition government does not create in the government a corresponding duty to act.

Prestopnik v. Whelan, 253 F. Supp. 2d 369, 375 (N.D.N.Y. 2003) (no violation where a teacher's attorney was given the opportunity to submit her complaint in writing); see Walker-Serrano v. Leonard, 168 F. Supp. 2d 332, 347 (M.D. Pa. 2001) (no violation where plaintiff elementary school student was not allowed to pass petitions to students but was afforded other avenues).

Plaintiff alleges that defendants infringed upon his First Amendment right to petition in denying him the opportunity to place items on the school board agenda for discussion. The right to petition does not require that plaintiff be given an opportunity to speak publicly about his petition nor that the government act upon his petition. See Prestopnik v. Whelan, 253 F. Supp. 2d at 374; Walker-Serrano, 168 F. Supp. 2d at 347. Plaintiff sent numerous letters to the board regarding the QSEP. (Id. ¶¶ 17, 19, 22, 24, 28). Defendants responded to these letters. (Id. ¶¶ 18, 20, 23, 25). Moreover, on May 4, 2004, plaintiff had the opportunity to publicly debate the QSEP. (Id. ¶ 25.) While plaintiff alleges that the Board did not vote on the adoption of the QSEP, that inaction does not violate plaintiff's constitutional rights. "[T]he First Amendment does

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not impose any affirmative obligation on the government to listen, [or] to respond." Smith, 441 U.S. at 465.

Plaintiff alleges that he made written requests and complaints to defendants, that he discussed the situation in person with individual defendants, and that he publicly presented the QSEP at a board meeting. The facts alleged by plaintiff demonstrate that there were opportunities to petition the government, albeit not in the forum that plaintiff desired. Therefore, plaintiff's complaint fails to state a claim for a violation of his right to petition at defendant's school board meetings.

Plaintiff further claims that his right to petition was violated when he was not permitted to discuss the QSEP at CIT meetings. (TAC ¶ 29.) Specifically, Severson told plaintiff and others that they would not be permitted to discuss the QSEP at a CIT meeting. (Id. ¶ 36.) However, Severson offered to meet with plaintiff personally to discuss the QSEP. (Id. ¶ 34.) Because plaintiff alleges facts that demonstrate that he was given an avenue to petition the government, his constitutional right was not violated. See Walker-Serrano, 168 F. Supp. 2d at 347.

Under Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995), in dismissing for failure to state a claim under Rule 12(b)(6) "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." Since the court has found that plaintiff's own allegations demonstrate that he was given avenues to petition the government, he could only cure this pleading by denying his own

allegations. Thus, Defendant's motion is GRANTED without leave to amend.

**3. Plaintiff's Free Exercise and Establishment Clause Rights[6]**

Plaintiff asserts that defendants' restriction of his participation in meetings, failure to give full review of his QSEP, and failure to remedy violations of his constitutional rights violate the Establishment Clause of the United States Constitution. The Establishment Clause provides: "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I, cl. 1. The prohibition of the Establishment Clause applies to state governments through the Fourteenth Amendment. Everson v. Board of Education, 330 U.S. 1, 8 (1947). According to the Supreme Court,

> the Establishment Clause [has come] to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a

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[6] Plaintiff brings a claim for relief under § 1983 for violations of his rights under the Establishment and Free Exercise clauses of the First Amendment. It is unclear from the face of the complaint whether plaintiff intended to bring claims under both of these clauses separately. Moreover, in his opposition papers, plaintiff incorporates his argument relating to the Establishment Clause in his argument relating to the Free Exercise Clause and alleges the same violations as under his Establishment Clause claim. Specifically, plaintiff alleges that defendants do not allow Christian citizens to participate in public debates and public policy-making to the same extent as non-Christians. Because this court cannot discern how these violations prevent plaintiff from exercising his religion, the court will address these violations under only the Establishment Clause. See Braunfeld v. Brown, 366 U.S. 599 (1961) (finding no Free Exercise violation where the disputed legislation did not criminalize the holding of any religious belief or opinion, did not force anyone to embrace any religious belief, or say or believe anything in conflict with his religious tenets); see also Johnson v. Robinson, 415 U.S. 361, 383-86 (1974).

> governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs.

County of Allegheny v. ACLU, 492 U.S. 573, 590-91 (1989) (footnotes omitted), quoted in Alvarado v. City of San Jose, 94 F.3d 1223, 1231 (9th Cir. 1996).

As decreed by the Supreme Court, and followed in the Ninth Circuit,[7] claims brought under the Establishment Clause are analyzed under the three-part "Lemon Test." See Lemon v. Kurtzman, 403 U.S. 602 (1971). Under the Lemon analysis, a statute or practice which touches upon religion must (1) have a secular purpose; (2) must neither advance nor inhibit religion in its principal or primary effect; and (3) must not foster an excessive entanglement with religion. County of Allegheny, 492 U.S. at 592; see Lemon, 403 U.S. at 612-13.

Defendants' argument under the establishment clause fails to address any of plaintiff's allegations in his claim for relief. Instead, defendants assert, generally, that they had discretion to reject plaintiff's QSEP and maintain the current science curriculum. Plaintiff does not claim that defendants did not have such discretion. Rather, plaintiff alleges that defendants violated his First Amendment constitutional rights by exhibiting hostility towards him and his beliefs. (TAC ¶¶ 16, 28, 36-37, 43-47). Plaintiff alleges that defendants' actions were motivated by "religious animus" and constituted government disapproval of Christian religious beliefs. (Id.)

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[7] See Brown v. Woodland Jt. Unif. Sch. Dist., 27 F.3d 1373, 1378 (9th Cir. 1994); Kreisner v. San Diego, 1 F.3d 775, 780 (9th Cir. 1993).

"In applying the purpose test, it is appropriate to ask whether government's actual purpose is to endorse or disapprove of religion." Wallace v. Jaffree, 472 U.S. 38, 56 (1985). In this case, the answer to this inquiry is dispositive and the court need not address the second and third elements of the Lemon test. See id.; Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, concurring) ("The purpose prong of the Lemon test requires that a government activity have a secular purpose."). Plaintiff has alleged that defendants inter alia restricted his participation at meetings, did not accord his QSEP appropriate review, and refused to remedy the denial of his constitutional rights based on their "religious animus." (TAC ¶¶ 16, 28, 36-37, 43-47). On a motion to dismiss, the court may only evaluate the allegations on the face of the complaint. See Fed. R. Civ. Proc. 12(b). Reading the complaint in the light most favorable to the plaintiff and drawing all reasonable inferences therefrom, plaintiff has sufficiently alleged that the primary purpose of the defendant's actions was to disapprove of plaintiff's actual or perceived religious beliefs. Defendants' *alleged* actions do not pass the secular purpose test. Thus, plaintiff has sufficiently pled a violation of his First Amendment rights under the Establishment Clause. Defendants' motion is DENIED.

**4. Plaintiff's Equal Protection Rights**

Plaintiff alleges a claim for relief against defendants under § 1983 for violations of the Equal Protection Clause. (Id. ¶ 71). Defendants allege that plaintiff has failed to properly allege any "suspect classifications" necessary for stating a claim for violation of his equal protection rights.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amdt. 14, § 1. This is "essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)). "The guarantee of equal protection is not a source of substantive rights or liberties, but rather a right to be free from discrimination in statutory classifications and other governmental activity." Williams, 367 F. Supp. 2d at 1270 (citing Harris v. McRae, 448 U.S. 297, 322 (1980)). "[D]iscrimination cannot exist in a vacuum; it can only be found in the unequal treatment of people in similar circumstances." Id. (quoting Attorney General v. Irish People, Inc., 684 F.2d 928, 946 (D.C. Cir. 1982)). Under the liberal notice-pleading standard, plaintiff need only allege a broadly identified class of similarly situated persons for an equal protections claim. See Williams, 367 F. Supp. 2d at 1271 (finding a broadly identified class was sufficient to put defendants on notice where plaintiff sufficiently alleged that he was treated differently from other teachers because he is an "avowed Christian").

Again, the court must accept as true all factual allegations made by plaintiff on a motion to dismiss. Plaintiff states that he is a Christian, whom defendants pejoratively refer to as a "right-wing evangelical Christian fundamentalist." (TAC ¶ 16). He alleges that defendants have restricted him and members of the public from exercising their rights under the First and

Fourteenth Amendment because of "an intent to discriminate against Caldwell and other citizens on the basis of their viewpoint and/or their religious beliefs and affiliations." (Id. ¶¶ 16, 28, 37). Plaintiff further alleges that "defendants are hostile to Caldwell's actual and perceived religious beliefs and affiliations and . . . have been motivated and continue to be motivated by such antireligious hostility in depriving Caldwell of constitutional rights." (Id. ¶ 28). Plaintiff claims that the defendants' "pattern and practice" violate the Equal Protection Clause.

Plaintiff has alleged that he is treated differently from other members of the community based upon his actual or perceived religious beliefs. In the context of the complaint, plaintiff's allegations identify the class of similarly situated persons as those parents and members of the community who participate in school board meetings, the curriculum instruction team, and challenges to the instructional materials. Under the liberal notice-pleading standard, these allegations are sufficient. See Williams, 367 F. Supp. 2d at 1271. Defendants' motion is DENIED.

**5. Plaintiff's Procedural Due Process Rights**

Plaintiff further alleges that defendants have subjected him to a deprivation of his rights to procedural due process under the Fourteenth Amendment. Specifically, plaintiff alleges that defendants, "motivated by their false presumptions about his perceived religious and political viewpoints," engaged in a "pattern and practice of preventing plaintiff from exercising his constitutional rights. (TAC ¶ 16). Plaintiff argues that defendants acted upon an unwritten, unconstitutionally vague

policy in deciding what matters would be placed on the meeting agendas. (See id. ¶ 49).

To allege a procedural due process claim on the basis of a vague regulation, a plaintiff must first allege a deprivation of a constitutionally protected interest, and second, allege that the deprivation was achieved by means of a constitutionally vague policy or procedure. Zinerman v. Burch, 494 U.S. 113, 125 (1990); Williams, 367 F. Supp. 2d at 1274. As demonstrated above, plaintiff has sufficiently alleged deprivations of his First Amendment rights in his complaint. Plaintiff alleges that all of the adverse conduct by defendants was performed pursuant to "established policies, practices, or customs." (TAC ¶ 49). Again, under a liberal notice-pleading standard, plaintiff's allegations are sufficient because they apprise defendants of the basis for the claims asserted against them. Taking plaintiff's allegations as true and deriving all reasonable inferences therefrom, plaintiff has alleged that the deprivation of his constitutional rights were achieved by unwritten policies and practices that are unconstitutionally vague on their face or as applied to plaintiff. Defendants motion is DENIED.

**D. Procedural Defects**

Defendants allege procedural defects with plaintiff's TAC under Rule 8(a). Rule 8(a) requires the complaint to provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Plaintiff has amended his complaint to sufficiently allege his claims for relief as well as the factual basis for those claims. Therefore, the TAC meets the requirements of Rule 8(a). Defendant's motion is thus DENIED.

Defendants also allege that plaintiff's TAC violates Rule 10(a). Defendants point to plaintiff's addition of the 10 "Doe defendants" as well as the addition of the "official capacity" designation following the names of the individual defendants. Plaintiff did not previously seek leave to amend his complaint to add the new defendants or the new designation. Because plaintiff was not granted leave to amend, the 10 Doe defendants as well as the "official capacity" designations of the individual defendants are STRICKEN.

**E. Leave to Amend**

Pursuant to Rule 15(a), "leave [to amend] is to be freely given when justice so requires." "[L]eave to amend should be granted unless amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay." Martinez v. Newport Beach, 125 F.3d 777, 785 (9th Cir. 1997). Though the court has stricken plaintiff's additions to the caption because plaintiff failed to properly seek leave to amend, plaintiff's TAC does allege claims against the 10 Doe defendants as well as the individual defendants "in their official capacity." Therefore, plaintiff is granted leave to amend the third amended complaint for the limited purpose of amending the caption to include the 10 Doe defendants and the "official capacity" designation following the names of the individual defendants.

**F. Request for Sanctions, Attorneys' Fees, and Costs**

Defendants request sanctions, attorneys' fees, and costs, alleging that the TAC is "totally without merit, frivolous, and in violation of the Federal Rules of Civil Procedure." (Def.'s

Mot. at 47). To the contrary, plaintiff's TAC has alleged colorable claims under § 1983. Therefore, defendants' request is DENIED.

**CONCLUSION**

1. Defendants' motion to dismiss plaintiff's claims against Roseville Joint Union High School District is GRANTED with prejudice because such claims are barred by the Eleventh Amendment.

2. Defendants' motion to dismiss plaintiff's state law claims against all individual defendants is GRANTED with prejudice because such claims are barred by the Eleventh Amendment.

3. Defendant's motion to dismiss plaintiff's claims for nominal damages is GRANTED with prejudice because such claims are barred by the Eleventh Amendment.

4. Defendant's motion to dismiss plaintiff's § 1983 claims is:

a. DENIED with respect to plaintiff's First Amendment free speech claims;

b. DENIED with respect to plaintiff's Free Exercise and Establishment Clause claims;

c. DENIED with respect to plaintiff's Equal Protection Clause claims;

d. DENIED with respect to plaintiff's procedural due process claims;

e. GRANTED with prejudice with respect to plaintiff's First Amendment right to petition claims.

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5. Defendant's request for sanctions, attorneys' fees, and costs is DENIED.

Plaintiff is granted twenty (20) days from the date of this order to file a fourth amended complaint in accordance with this order. Pursuant to this order, plaintiff's fourth amended complaint may only reflect changes to the caption of the complaint to include the 10 Doe defendants and the "official capacity" designation following the names of the individual defendants. Defendants are granted thirty (30) days from the date of service of plaintiff's fourth amended complaint to file a response thereto.

IT IS SO ORDERED.

DATED: October 25, 2005

/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE